

**IN THE
Supreme Court of the United States
OCTOBER TERM, 1984**

**NATIONAL LABOR RELATIONS BOARD,
*Petitioner,***

v.

**INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.,*
*Respondents.***

**On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit**

**MOTION FOR LEAVE TO FILE A
BRIEF AS AMICUS CURIAE AND
BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-861

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner,*

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.,*
Respondents.

On Writ of Certiorari to the United States
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**MOTION OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of respondents. The AFL-CIO has sought, but been unable to obtain, the consent of all of the parties to the filing of that brief.

**INTEREST OF THE AMICUS CURIAE AND THE
ISSUES COVERED IN THE BRIEF**

The AFL-CIO is a federation of 95 national and international labor organizations representing approximately 13,000,000 working men and women. These unions engage in collective bargaining in an effort to protect and advance the interests of the workers they represent. One of the

principal interests of working men and women is job security. That interest is placed in particular jeopardy by technological change which causes job displacement; accordingly, it has become a commonplace in collective bargaining for the parties to address the issues posed by such change.

The question presented in the instant case concerns the extent to which unions and employers are free, through collective bargaining, to respond to the challenge of innovations in the workplace. The National Labor Relations Board argues that while the federal labor law permits solutions designed to save jobs by preserving work previously performed by members of the bargaining unit, the law does not permit the parties to provide that the employer will reassign to the bargaining unit work that he had contracted out from the beginning in lieu of the work displaced by technological change.

It is the AFL-CIO's position that the work-preservation/work-acquisition dichotomy is inconsistent with the basic principles of the federal secondary boycott provisions and produces results incompatible with the overall policy of the labor laws. The Federation seeks leave to file the accompanying brief *amicus curiae* in order to so demonstrate.

CONCLUSION

For the foregoing reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
SUMMARY OF ARGUMENT	1
ARGUMENT	4
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

<i>Allen Bradley Co. v. Union</i> , 325 U.S. 797	16-17
<i>American Boiler Mfrs. Ass'n v. NLRB</i> , 404 F.2d 547 (8th Cir. 1968), <i>cert. denied</i> , 398 U.S. 960....	12
<i>Carpenters Union v. Labor Board</i> , 357 U.S. 93.....	7
<i>Consolidated Edison Co. v. Labor Board</i> , 305 U.S. 197	6
<i>Electrical Workers v. Labor Board</i> , 366 U.S. 667....	7
<i>Houston Contractors Ass'n v. NLRB</i> , 386 U.S. 664	8
<i>International Longshoremen's Association</i> , 221 NLRB 956 (1975), <i>enf'd</i> , 537 F.2d 706 (2d Cir. 1976)	12
<i>Labor Board v. Denver Bldg. Council</i> , 341 U.S. 675	6
<i>Labor Board v. Insurance Agents</i> , 361 U.S. 477....	6
<i>Labor Board v. Rice Milling Co.</i> , 341 U.S. 665.....	6-7
<i>Meat and Highway Drivers Local 710 v. NLRB</i> , 335 F.2d 709 (D.C. Cir. 1964).....	12
<i>NLRB v. Longshoremen</i> , 447 U.S. 490	<i>passim</i>
<i>NLRB v. Pipefitters</i> , 429 U.S. 507	<i>passim</i>
<i>Teamsters Local v. Lucas Flour Co.</i> , 369 U.S. 95....	6, 14
<i>Woodwork Manufacturers v. NLRB</i> , 386 U.S. 612..	<i>passim</i>

STATUTES

National Labor Relations Act, as amended, 29 U.S.C. § 151 <i>et seq.</i>	
§ 8(b) (4)	<i>passim</i>
§ 8(b) (6)	15-16
§ 8 (e)	<i>passim</i>
§ 10(k)	15

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**BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") files this brief *amicus curiae* contingent upon the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* is stated in the motion.

SUMMARY OF ARGUMENT

The National Labor Relations Board states the question presented here as "whether the Rules on Containers . . . 'seek[] no more than to preserve the work of bargaining unit members' or instead seek to . . . 'acquir[e] for [the ILA's] members work that had not previously been theirs.'" We agree with respondents that the court of appeals' answer to that question is correct—that the

Rules are work preservative in their intent. But in our view, posing the question in these terms needlessly complicates, and tends to distort, legal analysis of the issue presented.

The overriding aim of the national labor policy is to encourage employers and unions to enter into collective bargaining agreements that establish the terms and conditions of employment for the employer's employees. The secondary boycott laws, including § 8(e), were not intended to undermine that aim; the intent of those laws is to "shield[] unoffending employers and others from pressure in controversies not their own." *Labor Board v. Denver Building Council*, 341 U.S. 675, 692 (1951). Accordingly, the settled test for determining whether an agreement (or concerted activity) is primary or secondary is "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 645 (1967). Pp. 4-9 *infra*.

The work-preservation/work-acquisition dichotomy is inconsistent with this established test. By focusing attention on a factor that has no relevance in determining whether an agreement is primary or secondary—the past pattern of work distribution—the preservation/acquisition dichotomy imposes a rigid straightjacket that interferes with collective bargaining and that can lead to the condemnation of primary agreements. These results are unnecessary, because the "right-of-control" test as announced in *NLRB v. Pipefitters*, 429 U.S. 507 (1977), in itself, assures against neutrals becoming embroiled in labor disputes not their own. Pp. 9-12 *infra*.

In addition to its analytic flaws, the work-preservation/work-acquisition dichotomy creates significant practical difficulties. That dichotomy virtually defies principled application in a situation in which technological advances

have altered the nature of the work to be performed; it therefore provides no meaningful guidance to unions and employers seeking to conduct their affairs in accordance with the requirements of the law. Thus, while work acquisition agreements may, in particular circumstances, violate other provisions of the labor laws—and may violate § 8(e) if the union is seeking to acquire work over which the immediate employer has no control—there is no basis for holding that such agreements are *per se* unlawful under § 8(e). Pp. 13-15 *infra*.

Nothing in this Court's prior decisions compels the work-preservation/work-acquisition dichotomy. To the contrary, the Court repeatedly has concluded that the lawfulness of any agreement under § 8(e) turns on whether the agreement is primary or secondary, applying the general test set forth in *National Woodwork*. And since *Pipefitters* the Court has made clear that under that test a critical threshold inquiry is on the locus of control of the work in question rather than on the past pattern of work distribution. Pp. 15-21 *infra*.

Applying the *National Woodwork/Pipefitters* test, this case is easily resolved. There is no doubt that the Rules on Containers are both "addressed to the labor relations of the contracting employer[s] *vis-à-vis* [their] own employees," and seek the assignment of work over which the contracting employers have the right of control; indeed the NLRB expressly so found in sustaining most applications of the Rules. Accordingly, the judgment of the court of appeals sustaining those Rules *in toto* should be affirmed. Pp. 21-22 *infra*.

ARGUMENT

A. The opinion of the National Labor Relations Board in the instant case begins by posing the question for decision as follows:

The question presented in this case is whether the Rules of Containers negotiated by the International Longshoremen's Association (ILA) with the various employer associations representing east coast shipping lines in response to the technological innovation of containerized shipping are merely an attempt to preserve work historically performed by longshoremen represented by the ILA or instead are an effort to acquire for longshoremen represented by the ILA work which is not functionally related to their traditional work. [266 NLRB 230, 231]

The Board, in addressing that question, concluded that in most respects the Rules on Containers do preserve traditional longshore work, *id.* at 236, but that the Rules as applied to "shortstopping" (*i.e.*, pre-delivery stripping of a container destined for only one consignee) and to certain warehouse practices acquire for longshoremen work not functionally related to their traditional work. In the latter regard the Board emphasized that by reason of containerization the work in question (on-pier stripping of the containers) "no longer exists as a step in the cargo-handling process." *Id.* at 237.

In reversing the Board, the court of appeals addressed the question the Board had posed in its decision, but concluded that the Board had erred as a matter of law in its answer to that question:

Prior to containerization, truckers and warehousemen handled the cargo break-bulk; unloading of the cargo from the hold of the ship by the longshoremen obviously did not hinder these off-pier practices. Thus, one cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truck-

ers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate. [734 F.2d 966, 979]

In this Court, the Board again states the question presented as being "whether the Rules on Containers . . . 'seek[] no more than to preserve the work of bargaining unit members' or instead seek to . . . 'acquir[e] for [the ILA's] members work that had not previously been theirs.'" NLRB Br. at 27 (citations omitted); *see also* Teamsters Br. at 26. We agree with respondents that the court of appeals' answer to that question is the correct one—that the Rules on Containers do preserve work for longshoremen represented by the ILA.

But in our view, posing the question in these terms both needlessly complicates, and tends to distort, legal analysis. For, as we proceed to show, the issue here is whether the agreement is primary or secondary in nature. If the agreement is primary—*viz.* is "addressed to the labor relations of the contracting employer *vis-à-vis* his own employees," *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 645 (1967)—§ 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(e), presents no legal bar; indeed, the overriding aim of the national labor policy is to encourage employers and unions to enter into collective bargaining agreements which establish the terms and conditions of employment for the employer's employees represented by the union. The work-preservation/work-acquisition dichotomy impedes, rather than aids, resolution of § 8(e) cases by focusing attention on the fortuity of prior patterns of work distribution rather than on the basic threshold consideration of whether the employees are seeking work from their employer over which the employer has the right to control.

B. We begin our analysis with the fundamental proposition that "the keystone of the federal scheme to promote industrial peace" is the "ordering and adjusting of competing interests through a process of free and voluntary collective bargaining." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). As Chief Justice Hughes explained shortly after the Wagner Act was passed: "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 237 (1938). To accomplish that "manifest objective" the Wagner Act establishes a duty to bargain and also leaves each party to the bargaining process free to use "economic pressure devices . . . to make the other party incline to agree on one's terms." *Labor Board v. Insurance Agents*, 361 U.S. 477, 489 (1960). Thus, "[t]he presence of economic weapons in reserve and their actual exercise on occasion by the parties, is part and parcel of the system" of collective bargaining. *Id.*

In 1947 Congress enacted the Labor Management Relations Act ("LMRA") which altered the collective bargaining system established by the Wagner Act by, *inter alia*, proscribing the use of economic weapons where "an object thereof is . . . forcing or requiring any employer . . . to cease doing business with any other person." LMRA § 8(b)(4)(A), 61 Stat. 136. While the literal language of that provision standing alone could have been read to ban, *e.g.*, primary picketing of a struck employer, this Court has repeatedly recognized that Congress had the narrower intent of forwarding the "dual congressional objectives of preserving the right of labor organizations to bring primary pressure to bear on offending employers and of shielding unoffending employers and others from pressures in controversies not their own." *Labor Board v. Denver Bldg. Council*, 341 U.S. 675, 692 (1951). See also, *e.g.*, *Labor Board v. Rice Milling Co.*, 341 U.S. 665,

672 (1951); *Electrical Workers v. Labor Board*, 366 U.S. 667, 672 (1961).

Twelve years after the enactment of the LMRA, Congress passed the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") which "close[d] various loopholes in the application of § 8(b)(4)(A) which had been exposed in Board and Court decisions." *National Woodwork, supra*, 386 U.S. at 633. One of those "loopholes" was the product of *Carpenters Union v. Labor Board*, 357 U.S. 93 (1958) (*Sand Door*). There the Court had held that, as written, § 8(b)(4)(A) of the LMRA did not prohibit a union and employer from entering into a collective bargaining agreement restraining the signatory employer from doing business with another employer, even if the purpose of such an agreement was to involve the signatory employer in "controversies not [his] own." Section 8(e) was enacted to fill that gap in the law by proscribing such "hot cargo" agreements.

Like the LMRA's § 8(b)(4)(A), the LMRDA's § 8(e) was drafted to outlaw any contract provision in which an employer "agrees to . . . cease doing business with any other person." In *National Woodwork* this Court held that in enacting § 8(e) Congress did not intend to "expand the type of conduct which § 8(b)(4)(A) condemned." 386 U.S. at 365. The Court found that the legislative history of § 8(e) "defined the evil to be prevented in terms of agreements which obligated neutral employers not to do business with other employers involved in labor disputes with the union." *Id.* at 636. And the *National Woodwork* Court added:

[I]mportant parts of the historic accommodation by Congress of the powers of labor and management are §§ 7 and 13 of the National Labor Relations Act, passed as part of the Wagner Act in 1935 and amended in 1947. The former section assures to labor "the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of col-

lective bargaining or other mutual aid or protection. . . ." Section 13 preserves the right to strike, of which the boycott is a form, except as specifically provided by the Act. *In the absence of clear indicia of congressional intent to the contrary, these provisions caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions.* [*Id.* at 643; emphasis added]

The *National Woodwork* decision goes on to articulate a test for distinguishing primary agreements and boycotts from secondary ones—a test based upon the congressional understanding of the primary-secondary distinction: "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *Id.* at 645. Where that touchstone is satisfied the agreement and its maintenance are primary. But where "the tactical object of the agreement and its maintenance is [another] employer or benefits to other than the . . . employees of the primary employer—the agreement or boycott [is] secondary." *Id.* In a companion case decided on the same day, the Court restated the test as follows: "*National Woodwork Manufacturers* holds that collective activity by employees of the primary employer, the object of which is to affect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity." *Houston Contractors Ass'n v. NLRB*, 386 U.S. 664, 668 (1967).

The *National Woodwork* test has been consistently followed in the Court's subsequent § 8(b)(4) and § 8(e) decisions. See *NLRB v. Pipefitters*, 429 U.S. 507, 528 (1977); *NLRB v. Longshoremen*, 447 U.S. 490, 504 (1980). In *Pipefitters* the Court elaborated upon this test in the course of holding that employees of a heating subcontractor had acted unlawfully in refusing to handle prefabricated climate control units which the subcon-

tractor was required to install on a particular construction project by virtue of the subcontractor's contract with the general contractor. The Court concluded that since the general contractor controlled whether the fabrication work on the climate control units would be done on the construction site or at a factory, "[b]y seeking the [fabricating] work at the [construction project in question], the union's tactical objects necessarily included influencing [the general contractor]; this conduct falls squarely within the statement of *National Woodwork* that a union's activity is secondary if its tactical object is to influence the boycotted employer." *NLRB v. Pipefitters*, *supra*, 429 U.S. at 529-30 n. 16. This "'right-of-control' test of *Pipefitters*," *NLRB v. Longshoremen*, *supra*, 447 U.S. at 504, is now an essential part of the inquiry mandated by *National Woodwork*.

C. The work-preservation/work-acquisition dichotomy is inconsistent with the established test for assessing whether an agreement or conduct is primary or secondary and with the fundamental principles that test embodies. Moreover, the preservation/acquisition dichotomy can lead to the condemnation of primary, concerted activity and primary collective bargaining agreements notwithstanding Congress' desire to protect such activity and such agreements. This is true for a very simple reason: the distinction between work preservation and work acquisition turns on factors that have no relevance in determining whether the union's conduct, or the collective agreement, is primary or secondary.

As the very terms imply, the preservation/acquisition dichotomy focuses attention on the pattern of work distribution that existed in the past, before a challenged agreement was signed or economic pressure was exerted. The first step is to identify "the 'work' that [an] agreement allegedly seeks to preserve," *NLRB v. Longshoremen*, *supra*, 457 U.S. at 505; where there has been a technological innovation, this requires identifying "the

work as it existed before the innovation," *id.* at 507. Under this approach the past imposes a rigid straightjacket on collective bargaining; any attempt by a union to go outside the preexisting work-allocation lines invites the label "work acquisition."

The point is perhaps best made by considering two hypotheticals:

Manufacturer A operates a plant at which the custodial work has historically been done by A's employees. A receives a proposal from a firm that does janitorial work to do A's work on a contract basis; A concludes that it would be cheaper to accept this proposal and to subcontract for janitorial services. The union representing A's employees engages in concerted activity to prevent A from entering into the subcontracting arrangement and eventually secures an agreement precluding the subcontracting of the custodial work.

Manufacturer B operates a plant at which a subcontractor has historically performed the custodial work. B desires to introduce new technology into its manufacturing process which will significantly reduce the number of B's employees. The union representing B's employees secures from B an agreement to cease subcontracting the janitorial work and to assign that work instead (at no increased cost to B) to bargaining-unit employees who would otherwise be laid off.

As we understand the work-preservation/work-acquisition dichotomy, the hypothesized agreement with employer A would be a lawful work-preservation agreement whereas the hypothesized agreement with employer B would be an unlawful work-acquisition agreement. But from the perspective of the secondary boycott laws, that distinction makes no sense. The union's objective in each instance is precisely the same: that the employer do its own janitorial work through the employer's own employees. And, in each instance, the employer has the right of control over that work.

Moreover, the conclusion required by the preservation/acquisition dichotomy—that agreement A is primary and agreement B secondary—has two untoward results.

First, that conclusion makes collective bargaining more difficult by placing added pressure on unions to resist any and all proposals to contract out work the employer could do with his own employees. The stakes are entirely different if the consequence of an agreement permitting the employer the flexibility to contract out is that work once surrendered cannot be reacquired without running afoul of the secondary boycott laws than if the parties are free to continually explore in light of changing circumstances the extent to which the employer should do his own work with his own employees.¹

Second, as the hypothetical situation of employer B illustrates, the preservation/acquisition dichotomy interferes in particular with the parties' ability to respond to technological change by assigning to a bargaining unit in lieu of work that is being displaced by automation a

¹ The adverse consequences described in text are limited to the extent the work preservation doctrine permits work recapture. See, e.g., *American Boiler Mfrs. Ass'n v. NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (permitting work recapture clause so long as work was not "completely lost before the clause was negotiated"); *Meat and Highway Drivers Local 710 v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964). But the Board has held that work recapture is not permissible where the union previously "abandoned" its claim to the work in question by agreeing to the subcontracting of that work, *International Longshoremen's Association*, 221 NLRB 956, 960 (1975), *enf'd*, 537 F.2d 706 (2d Cir. 1976); that holding has all of the consequences described in text.

The "work recapture" principle also magnifies the anomalies inherent in the preservation/acquisition dichotomy. Under that principle—which, in certain circumstances, treats recapture as preservation rather than acquisition—a union demand that an employer that has subcontracted out work cease doing so may be held to be primary or secondary, depending upon how long ago the subcontract was made and how completely the work has been subcontracted. Yet these circumstances have nothing to do with the purposes of the secondary boycott laws.

part of the employer's work that previously had been contracted out. The preservation/acquisition dichotomy is thus inconsistent with "[t]he national labor policy [which] expresses a preference for addressing 'the threats to work posed by increased technology and automation' by means of 'labor-management agreements to ease these effects through collective bargaining on this most vital problem created by advanced technology.'" *NLRB v. Longshoremen, supra*, 447 U.S. at 505.

Nothing in the purposes underlying the secondary boycott laws requires, or even supports, these results. To repeat the lesson of *Denver Building Council* and its progeny, the secondary boycott laws were designed to "shield[] unoffending employers and others from pressure in controversies not their own." P. 6 *supra*. In the class of situations at issue here, the right-of-control test, standing alone, assures that result: that test precludes a work-allocation agreement (whether one to preserve or acquire work) unless the employer has control over the work being allocated, and the test also precludes the use of economic pressure to enforce such an agreement where the employer lacks control over the particular work at issue. But, in contradistinction to the preservation/acquisition dichotomy, the right-of-control test does recognize that a union that seeks an agreement with an employer by which the employer would use his own employees to do the employer's work—*viz.* work over which the employer has the right of control—even if that work previously was done by others, is "address[ing] . . . the labor relations of the contracting employer *vis-à-vis* his own employees" and, thus, is engaging in primary activity.

In sum, in light of the right of control test, the preservation/acquisition dichotomy is unnecessary to achieve the aims of the secondary boycott laws. And that dichotomy, by focusing attention on past work distribution practices, introduces an irrelevant and misguided inquiry into § 8(b)(4) and § 8(e) analysis.

D. Aside from its analytic flaws the work-preservation/work-acquisition dichotomy also creates significant practical problems: that dichotomy virtually defies principled application in a situation in which technological advances have altered the nature of the work to be performed. Consequently, the dichotomy provides no meaningful guidance to unions and employers seeking to conduct their affairs in accordance with the requirements of the law.

The difficulties in applying the preservation/acquisition dichotomy are well-illustrated by the tortured history of this litigation over the Rules on Containers. As the Board states in its brief, "in determining the lawfulness of the Rules the Board has been faced with the task of assessing the extent to which the Rules preserved 'the essence of traditional work patterns' in a setting in which work patterns have been radically altered by containerization." *NLRB Br.* at 27. And that task has been made even more complicated by the fact that "the impact of containerization occurred at the interface between ocean and motor transport; not surprisingly, the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers." *NLRB v. Longshoremen, supra*, 447 U.S. at 508. The result has been a decade of litigation all designed to determine whether the Rules on Containers are work-preservational.

The lesson of this litigation for other unions and employers is equally troubling. Under the preservation/acquisition line of analysis as applied in this case, where, as here, new technology has "changed the method of doing the work," *id.* at 505, in order to determine the lawfulness *vel non* of a proposed agreement to allocate the modified work to a particular unit of employees, a union and employer must anticipate the answer the Board and the courts will ultimately give to whether "the historical and functional relationship between th[e] retained work and [the] traditional . . . work can support the conclu-

sion that the objective of the agreement was work preservation." *Id.* at 510. As the instant case well illustrates, that is not an inquiry whose outcome can be readily predicted in advance.

In contrast, the test of *National Woodwork and Pipefitters* provides much clearer guidance to the parties to a collective bargaining relationship. Under that test, the parties may enter into and the union may enforce an agreement which allocates work over which the employer has control; they may not do so with respect to work as to which some other entity has control. This test thus frees the parties to bargain over matters within the employer's control, thereby accommodating both the congressional decision to establish a system of collective bargaining for "the ordering and adjusting of competing interests" of the employer and his employees, *Lucas Flour, supra*, 369 U.S. at 104, and, more specifically, "the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace," *NLRB v. Longshoremen, supra*, 447 U.S. at 511.

E. Of course, the fact that, as we have just shown, a work-acquisition agreement is not necessarily secondary (if the immediate employer has control over the work in question) does not mean that such an agreement (or its enforcement) would be automatically lawful under *other* provisions of the labor laws. If, for example, a union seeks to acquire work that had never previously been performed by anyone because the work is unnecessary, the union's conduct would have to be tested under § 8(b)(6), the provision of the LMRA governing featherbedding (although it is noteworthy that this provision was narrowly drawn by Congress so as to leave the parties to a collective bargaining relationship free, in the main, to decide what work is necessary and what unnecessary). Similarly, if a union seeks to acquire work at the expense of the employer's employees in an-

other union, the union's action would be subject to invalidation under the provisions governing jurisdictional disputes, § 8(B)(4)(D) and § 10(k).

But the fact that a work acquisition agreement, or its enforcement, may in certain circumstances violate these other provisions does not mean that such an agreement or conduct also violates the secondary boycott provisions of the Act. To the contrary, the very fact that Congress enacted §§ 8(b)(4)(D) & 8(b)(6) which regulate particular aspects of work-acquisition efforts confirms our contention that a work acquisition agreement is not *per se* violative of § 8(e) but rather must be measured against the overall standard that separate primary from secondary agreements.

F. Nothing in this Court's prior decisions forecloses the analysis set forth above or compels the Board's conclusion that work acquisition is *per se* secondary. On the contrary, the prior cases, fairly read, support our analysis.

1. *National Woodwork* is sometimes said to be the genesis of the preservation/acquisition dichotomy and to support the proposition that work acquisition is by definition secondary. But that is not at all what *National Woodwork* teaches.

At issue in *National Woodwork* was a work preservation agreement between a general contractor and a carpenters union whose members had traditionally done the work of cutting and fitting doors; the agreement provided that carpenters would not handle (*viz.*, install) prefabricated doors, effectively precluding the contractor from doing business with door manufacturers. The Board sustained the agreement but the Seventh Circuit reversed, holding that the agreement "violated § 8(e) without regard to any 'primary' or 'secondary' objective." 386 U.S. at 618.

The issue posed to this Court in *National Woodwork* thus was whether § 8(e) is to be read literally to proscribe all collective bargaining agreements which contain a provision to "refrain from handling . . . any of the products of any other employer," or whether § 8(e) is to be read to prohibit only such agreements that are secondary in nature. The Court reached the latter conclusion, and formulated the general test for distinguishing primary from secondary activity on which we rely here. See pp. 7-8 *supra*.

To be sure, in the course of its analysis in *National Woodwork* the Court placed emphasis on the fact that the agreement at issue was designed to preserve work for the carpenters and the Court noted that if § 8(e) were read to proscribe primary as well as secondary agreements, as the Seventh Circuit had held, even work-preservation agreements would be rendered unlawful; the Court thought it especially unlikely that Congress would have intended, *sub silentio*, to achieve that result. See 386 U.S. at 840-42. But while this discussion—and other statements in the Court's opinion, *e.g.*, 386 U.S. at 645-46—could conceivably be read to suggest that the Court viewed all work-preservation agreements as *ipso facto* lawful, nothing in the Court's discussion of work preservation agreements indicates that the Court thought such agreements to be the *only* type of work allocation agreement that is primary and hence permissible under § 8(e). Indeed, elsewhere in its opinion the Court expressly reserved judgment on the lawfulness of work-acquisition agreements and their enforcement, stating "[w]e . . . have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product." *Id.* at 630-31.²

² *National Woodwork* discussed work acquisition in the context of responding to the employers' reliance on *Allen Bradley Co. v.*

Thus, the ultimate lesson to be drawn from *National Woodwork* is that the lawfulness of a work-acquisition agreement or of economic pressure aimed at work acquisition, like the lawfulness of any other type of work allocation agreement or of any other type of concerted activity, turns on whether the union is engaged in primary or secondary activity—turns, in other words, on whether the "agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees" or whether "the agreement and boycott were tactically calculated to satisfy union objectives elsewhere." *Id.* at 643-44.

2. That this is the correct reading of *National Woodwork* is confirmed by the Court's subsequent decision in *NLRB v. Pipefitters, supra*. In that case, the employees of the heating subcontractor, in refusing to install prefabricated climate-control units, were acting "for the purpose of preserving work they had traditionally performed." 429 U.S. at 514. Nonetheless, as previously noted, this Court affirmed the NLRB's conclusion that the refusal to install the units was secondary, and hence

Union, 325 U.S. 797 (1945), and on portions of the legislative history of the LMRA which the employers contended evidenced a congressional intent to incorporate the result reached in *Allen Bradley* into § 8(b)(4)(A). See *National Woodwork*, 386 U.S. at 628-30. (The Teamsters in the instant case make a similar argument, see *Teamsters Br.* at 28, 43-44.) It is therefore important to point out that in *Allen Bradley* the electrical workers union, in threatening to boycott electrical contractors which purchased electrical fixtures made by a non-union shop, was seeking to acquire work *not for the employees of the contractors but for employees of the fixture manufacturers*. As the Court stated in *National Woodwork*, "This is a secondary object because the cessation of business was being used tactically, with an eye to its effect on conditions elsewhere." 386 U.S. at 629. Thus, the fact that the type of work-acquisition activity involved in *Allen Bradley* is unlawful says nothing about whether work acquisition is secondary where the union seeks to acquire work for the employees engaged in the concerted activity and where the employer has control over the work being sought.

violative of § 8(b)(4)(B), because the decision to use prefabricated units was not one within the control of the employee's own employer but rather was in the control of the general contractor, who had mandated prefabricated units; thus in refusing to install those units the union's "objectives were not confined to the employment relationship with [the subcontractor] but included the object of influencing [the general contractor] in a manner prohibited by § 8(b)(4)(B)." *Id.* at 531.

Of particular significance for present purposes is *Pipefitters'* treatment of the work-preservation defense that the union there raised. The Court made clear that the term "work preservation"—and, by logical implication, its counterpart "work acquisition"—is not a talisman whose incantation resolves cases arising under the secondary boycott laws. To the contrary, the Court labeled "untenable under the Act and our cases" the proposition that "where a union seeks to enforce a work-preservation agreement by a strike or work stoppage, the existence of the agreement would always provide an adequate defense to a § 8(b)(4) unfair labor practice charge." *Id.* at 515. The Court explained: "[e]ven though a work-preservation provision may be valid in its intendment and valid in its application in other contexts, efforts to apply the provision so as to influence someone other than the immediate employer are prohibited by § 8(b)(4)(B)." *Id.* at 521 n.8.

The Board here relies on dictum in a footnote in *Pipefitters* in which the Court responded to the dissent's argument that even though an aim of the pipefitters in refusing to install the prefabricated units was to induce the subcontractor to force the general contractor to use units that were not prefabricated, the boycott was nonetheless primary because the union's ultimate object was to benefit the subcontractor's employees. In rejecting that contention, the Court stated:

National Woodwork did not . . . adopt this standard for applying the proscriptions of § 8(b)(4)(B). The distinction between primary and secondary activity does not always turn on which group of employees the union seeks to benefit. There are circumstances under which the union's conduct is secondary when one of its purposes is to influence directly the conduct of an employer other than the struck employer. In these situations, a union's efforts to influence the conduct of the nonstruck employer are not rendered primary simply because it seeks to benefit the employees of the struck employer.

* * * *

The *National Woodwork* opinion also noted that the Court then had no occasion "to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks." That reservation was apparently meaningless, for under the theory of the dissent . . . striking workers may legally demand that their employer cease doing business with another company even if the union's object is to obtain new work so long as that work is for the benefit of the striking employees. If, for example, [the subcontractor] had in the past used prepiped units without opposition from the union, and the union had demanded that [the subcontractor] not fulfill its contract with [the general contractor] . . .—all for the benefits of [the subcontractor's] employees—it would appear that the dissenters' approach would exonerate the union. . . . We disagree, for the union's object would necessarily be to force [the subcontractor] to cease doing business [with the contractor] not to preserve, but to aggrandize, its own position and that of its members. Such activity is squarely within the statute. [429 U.S. at 529-30 n.16.]

In its brief in this case, the Board seizes upon the last two sentences from the quoted passage and treats them as if they were a holding that whenever a union acts "to

aggrandize its own position" the union is engaged in secondary activity. But that is not a fair reading of even the literal words of the footnote; the Court's discussion of "aggrandizement" is in the context of a specific hypothetical the Court posited in which the subcontractor does *not* have the right of control over the work the union seeks to acquire. Moreover, the entire point of the footnote—as of the *Pipefitters* opinion as a whole—is to emphasize that the distinction between primary and secondary activity turns on whether the union seeks "to influence directly the conduct of an employer other than the struck employer." It thus would be a perversion of *Pipefitters* to conclude, as the Board does, that a work acquisition agreement is *per se* unlawful even if the agreement seeks to influence only the conduct of the immediate employer.

3. The only other precedent on which the Board relies is *NLRB v. Longshoremen*, *supra* ("ILA I"), this Court's prior decision in this case. That decision provides no sustenance to the Board.

The Court began its analysis there as follows:

Although § 8(e) does not in terms distinguish between primary and secondary activity, we have held that, as in § 8(b)(4)(B), Congress intended to reach only agreements with secondary objectives.

Among the primary purposes protected by the Act is "the purpose of preserving for the contracting employees themselves work traditionally done by them." [447 U.S. at 504; emphasis added; citations omitted]

The Court then proceeded to delineate the proper method of proceeding where a work-preservation purpose is proffered as a defense to a § 8(e) charge (stressing, *inter alia*, that "the contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test of *Pipefitters*," *id.* at 504).

Because of the attention the Court devoted to the work preservation issue in *ILA I*, the effect of the decision may have been to focus the making of the record on the subsidiary questions implicated by that issue: identifying "the 'work' the agreement allegedly seeks to preserve," *id.* at 505, and determining "whether the historical and functional relationship between th[e] retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation . . .," *id.* at 510. Nonetheless, it is important to bear in mind that as the words we have italicized from the Court's opening sentences make clear, *ILA I* did *not* hold that a work-preservation agreement is the only type of agreement protected by § 8(e); that question simply was not presented to the Court in *ILA I*. And it is noteworthy that the Court twice cautioned that to find a violation of § 8(e) the Board would have to find that "the objective of the agreement was . . . the satisfaction of union goals elsewhere." *Id.* at 510; *see also id.* at 511.

In sum, this Court has never held that work-acquisition agreements are *per se* unlawful (or that work-preservation agreements are *per se* lawful). To the contrary, the Court repeatedly has concluded that the lawfulness of any agreement under § 8(e) turns on whether the agreement is primary or secondary, applying the general test set forth in *National Woodwork*. And since *Pipefitters* the Court has made clear that under that test the critical inquiry is on the locus of control over the work in question rather than on the past pattern of work distribution.

G. Once the proper test is applied, this case is revealed to be simple and straight forward. For as the Board concluded in upholding all but the applications of the Rules on Containers at issue here, "the shipping lines d[o] have the right to control the assignment of this [the stripping and stuffing] work, since they owned or leased the containers and could prescribe the conditions for re-

lease of these containers to shippers, consolidators, truckers, and warehouses." 266 NLRB at 234. The Board based this conclusion on subsidiary findings by the Administrative Law Judge which the Board affirmed, *see id.* at 230:

Steamship companies and marine terminal operators have invested their capital and developed the technology which made containers available to the public and which increased their utility through specialized container vessels, container cranes, and other facilities contributing to a dramatically increased productivity on the docks. The wisdom and resources of contracting employers, exclusively, have made this technology available, and shippers, importers, and their agents are simply the beneficiaries, having played no part in the proliferation of this innovative trend. . . . [The Rules on Containers] w[ere] a response to restrain otherwise discretionary action of the immediate contracting employers, who, through their development of and control over the job-eroding technology, are the primary offenders of the job interests of their own employees. The ILA's effort to preserve their work through negotiated restrictions with respect to whom and under what conditions the container technology is to be released to outsiders relates directly to a labor relations problem within the primary work unit. Furthermore . . . said obligations are imposed upon signatory employers at a time when the latter possess power to comply. [*Id.* at 261]

Thus the Rules on Containers are a primary agreement and hence are lawful under § 8(e).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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